86-665

No. 86-.....

In The
Supreme Court of the United States
October Term, 1986

In the Matter of The Complaint of PARADISE HOLDINGS, INC., a Hawaii corporation, as owner of, and Paradise Cruise, Limited, A Hawaii corporation, as lessee and charterer of the P/V PEARL KAI, Official Number 527 873, for exoneration from or limitation of liability,

TERRY LEE K. STONE, Individually; As Special Administratrix of the Estate of PAUL HENRY STONE; and As Guardian Ad Litem For PAUL HENRY STONE, JR. and JEREMY NOAH KAMEALOHAOKUULEI STONE, minors,

Petitioners,

vs.

PARADISE HOLDINGS, INC. and
PARADISE CRUISE, LIMITED,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

DAVID C. SCHUTTER
Counsel of Record

GEORGE W. PLAYDON, JR.
ROBERT K. MERCE
SCHUTTER CAYETANO PLAYDON
618 Kawaiahao Plaza
567 South King Street
Honolulu, Hawaii 96813
Telephone: (808) 524-4600

Counsel for Petitioners TERRY LEE K. STONE, Individually; As Special Administratrix of the Estate of PAUL HENRY STONE; and As Guardian Ad Litem For PAUL HENRY STONE, JR. and JEREMY NOAH KAMEALOHAOKUULEI STONE, minors

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

631

I. QUESTION PRESENTED FOR REVIEW

Whether an injunction issued by a United States District Court pursuant to 46 U.S.C. § 185 (1982) of the Shipowners Limitation of Liability Act of 1851 ("the Act"), enjoining the prosecution of a state court tort action against the captain of a vessel whose alleged negligence caused the death of a bodysurfer, violates § 187 of the Act which states, in pertinent part:

> Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any . . . negligence, fraud or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seamen of any vessel may by law be liable, notwithstanding such master or seamen may be an owner or part owner of the vessel.

II. LIST OF PARTIES

The following are the names of all parties to the proceeding in the Court of Appeals. It should be noted that none of the parties listed below filed briefs or participated in argument before the appellate court:

Mr. Raymond Lemaster
1525 8th Street
Moundsville, W. Virginia 26041

Ms. Betty Zelaski
2000 Meighen Avenue
Moundsville, W. Virginia 26041

Mr. John Zumbrunnen
2409 Second Street
Moundsville, W. Virginia 26041

Mr. Lewis Epstein
Mrs. Celia Epstein
c/o Mark S. Davis, Esq.
and Stanley E. Levin, Esq.
10 Marin Street
Honolulu, Hawaii 96817

Ms. Laura Egol
c/o Edward J. Bybee, Esq.
and James McWhinney, Esq.
Suite 2057, PRI Tower
Grosvenor Center
733 Bishop Street
Honolulu, Hawaii 96813

Mr. Fred Lescher
Mrs. Marianne Lescher
c/o Edward J. Bybee, Esq.
and James McWhinney, Esq.
Suite 2057, PRI Tower
Grosvenor Center
733 Bishop Street
Honolulu, Hawaii 96813

Mr. Herman Newnan
Mrs. Jane Newnan
c/o Paul D. Bekman, Esq.
Kaplan, Hyeman, Greenberg, Engelman
& Belgrad, P.A.
Tenth Floor, Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

V. CITATION TO OFFICIAL REPORTERS

The opinion of the Ninth Circuit Court of Appeals is reported at 795 F.2d 756 (9th Cir. 1986).

The opinion of the United States District Court for the District of Hawaii is reported at 619 F.Supp. 21 (D.C. Cal. 1984).

———o———

VI. JURISDICTION

The opinion of the Court of Appeals was filed on July 25, 1986. The time of filing is not indicated on the opinion.

This Court has jurisdiction over a petition for Writ of Certiorari from a United States Court of Appeals pursuant to 28 U.S.C. § 2101(c) which states:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

———o———

VII. STATUTES INVOLVED

Two statutes are involved in this case. The first is 46 U.S.C. § 185 (1982) which states:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written

notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. *Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.*[1] (Emphasis added.)

The other statute is 46 U.S.C. § 187 (1982):

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruc-

---

1 Rule F3 of the Supplemental Rules for Certain Admiralty and Maritime Claims also permits injunctions to prohibit the prosecution of state and federal claims against vessel owners. Rule F3 states:

> (3) *Claims Against Owner; Injunction.* Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

tion of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

———o———

VIII. STATEMENT OF THE CASE

A. Facts Material To Consideration Of Question Presented For Review.

Petitioners are the survivors of 28-year-old Paul Stone.

On June 19, 1984, Mr. Stone was bodysurfing in a recreational area on the south shore of the island of Oahu known as "Point Panic". Just before noon the P/V Pearl Kai, returning from a Pearl Harbor cruise, entered Kewalo Basin channel which is adjacent to Point Panic. As the Pearl Kai approached the bodysurfing area, it caught a wave and literally began "surfing". The captain lost control of his vessel and it veered sharply to the right. The port engine then failed. In an apparent attempt to regain control of the vessel, the captain reversed his starboard engine and began backing up. He backed completely across the channel and directly into a large group of bodysurfers which included Mr. Stone. Mr. Stone was sucked beneath the Pearl Kai and decapitated by its propeller blades. His body was recovered from waters near Point Panic two days later.

B. Proceedings In The Lower Courts.

On June 27, 1984, Petitioners filed a negligence action in the First Circuit Court of the State of Hawaii against the captain of the Pearl Kai (Edward Bruhn), its owner (Paradise Holdings, Inc.), and its purported charterer (Paradise Cruise, Ltd.). The state court complaint seeks $4 million in compensatory damages and $20 million in punitive damages.

PARADISE HOLDINGS, INC. and PARADISE CRUISE, LIMITED (hereinafter "PARADISE") carried at least $3 million in liability insurance at the time of the accident involving Mr. Stone, and for purposes of this appeal it is undisputed that the captain of the Pearl Kai was an insured under the PARADISE policies. *Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 762 (9th Cir. 1986).

Notwithstanding the availability of insurance, on July 17, 1984, PARADISE filed an action in the United States District Court for the District of Hawaii under the Shipowners Limitation of Liability Act of 1851 (46 U.S.C. §§ 181-195) to limit their liability for injuries and losses to the value of the Pearl Kai which was stated to be $625,000. Jurisdiction for the limitation proceeding was based on 28 U.S.C. § 1333 (original admiralty jurisdiction).

On July 17, 1984, PARADISE also requested and received an *ex parte* injunction which prohibited Petitioners from prosecuting their state court action *against the captain* of the Pearl Kai until the conclusion of the limitation proceeding. The injunction was issued despite the fact that the captain of the Pearl Kai was not a party to the

limitation proceeding and such injunctions are clearly prohibited by § 187 of the Act.

On July 31, 1984, Petitioners moved to dissolve or modify the injunction to allow them to proceed with their state court suit against the captain of the Pearl Kai. The basis of the motion was that the injunction violated § 187 of the Act. Petitioners also moved to dismiss the limitation proceeding for lack of admiralty jurisdiction.[2]

The District Court refused to dissolve or modify the injunction and denied Petitioners' Motion to Dismiss For Lack Of Jurisdiction. *Complaint of Paradise Holdings, Inc.*, 619 F.Supp. 21 (D.C. Cal. 1984).

Petitioners then appealed to the United States Court of Appeals for the Ninth Circuit.[3] In an opinion filed on July 25, 1986, the Court of Appeals affirmed the decision of the District Court. The panel found that the District Court had original admiralty jurisdiction under 28 U.S.C. § 1333. Two members of the panel held that the District Court did not abuse its discretion in refusing

---

[2] In the court below, it was petitioners position that: (1) accidents involving swimmers and bodysurfers are not within federal admiralty jurisdiction because such accidents do not bear a significant relationship to "traditional maritime activities," *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); and 2) the District Court lacked admiralty jurisdiction because Point Panic, a state regulated recreational area, is not and never has been "navigable waters." *Adams v. Montana Power Company*, 528 F.2d 437 (9th Cir. 1975).

[3] The District Court's refusal to dissolve or modify the injunction was appealable under 28 U.S.C. § 1292(a)(1). The jurisdictional question was certified for interlocutory appeal under 28 U.S.C. § 1297(b). 795 F.2d at 758.

to dissolve or modify the injunction as it pertained to the captain of the Pearl Kai. The majority's rationale was that a major purpose of the Act is to permit a shipowner to retain the benefit of his insurance and that this purpose would be frustrated if petitioners were allowed to pursue their state court action against the captain of the Pearl Kai before the conclusion of the limitation action. 795 F.2d at 762. The majority also found that since the available insurance may not be sufficient to cover all pending claims, the injunction was proper to ensure an equitable division of the limitation fund among all potential claimants. The specific holding of the Court of Appeals was:

> We conclude, therefore, that it is sometimes inconsistent with the purposes of the Act to permit some limitation-action claimants to proceed in state court against a ship's captain and crew in advance of an equitable division of the limitation from among all potential claimants. We hold that in such cases, a District Court has discretion to stay the state court action or otherwise to shape the limitation proceedings in a manner that promotes the purposes of the Act.
>
> 795 F.2d at 763.

Circuit Court Judge Ferguson filed a separate opinion concurring in part and dissenting in part. He agreed that the District Court had jurisdiction but disagreed with the majority's conclusion that the injunction of the state court action did not violate § 187 of the Act. Judge Ferguson reasoned that § 187 is clear on its face and flatly prohibits District Court's from enjoining state court proceedings against the master, officers or seamen of a vessel. He also concluded that the majority's position did not further the purposes of the Act, that a shipowner having

too little insurance was not a proper basis for enjoining a state court proceeding against the captain, and that the injunction violated well established principles of comity between state and federal courts.

IX. THE SUPREME COURT SHOULD REVIEW THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

A. Introduction.

The Act permits shipowners to limit their liability, for accidents which occur without their "knowledge or privity," to the owner's interest in the ship and its cargo. 46 U.S.C. § 183. The purpose of the Act is to encourage ship building, to promote investment in ships and employment in ship commerce, and to place American shipping interests on an equal footing with that of other maritime nations. *Flink v. Paladini,* 279 U.S. 59, 49 S.Ct. 255, 73 L.Ed. 613 (1929); see generally, 3 A. Jenner, B. Chase & J. Loo, *Benedict On Admiralty,* §§ 6-7 at 1-42 to 1-47 (7th Ed. 1985); 2 M. Norris, *The Law Of Seamen,* § 30:47, at 538-40 (4th Ed. 1985).

Procedurally, when an owner receives notice of a claim arising out of the voyage of his ship, he may file a limitation complaint and post security equal to the ship's value. 46 U.S.C. § 185. The owner is then entitled to an injunction to prohibit any further proceedings against him with respect to the claims which are the subject to the limitation action. 46 U.S.C. § 185. The charterer of a vessel is deemed to be an owner for limitation purposes. 46 U.S.C. § 186. If the value of the ship and its cargo are insufficient to satisfy all claims, the Act provides for equitable apportionment among claimants. 46 U.S.C. § 184.

The Act applies only to vessel owners and charterers; it does not apply to masters, officers, or seamen. This is clearly stated in § 187. Indeed, § 187 specifically states that masters, officers, and seamen may not limit their liability even if they are owners or part owners of a vessel. *Id.*

The Court of Appeals held that notwithstanding the plain strictures of § 187, federal courts *may* enjoin state court proceedings against the captain of a vessel if the captain is insured under the same policy as the owner or charterer and the claims against the owner and charterer exceed the insurance policy limits. This is a radical departure from established procedure and is contrary to the plainly expressed intent of Congress. See *In re Matter of Brent Towing Company, Inc.*, 414 F.Supp. 131 (N.D. Fla. 1975). It also impermissibly expands an act which courts and commentators alike have said is obsolete, outmoded, unjust, and should be narrowly and restrictively construed. See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed.2d 806 (1954); G. Gilmore and C. Black, *The Law of Admiralty*, 843 (2d Ed. 1975). It virtually ensures that the victims of maritime disasters will not have a meaningful forum in which to pursue their claims against negligent masters, officers and seamen. If the Ninth Circuit's opinion is not reversed, the availability of insurance will become a crucial issue in determining whether an injunction may be issued against a ship's crew. And because limitation actions will always precede actions against negligent crew members, accident victims may be deprived of a jury trial in state courts by virtue of collateral estoppel principles. Further, the decision of the Court of Appeals will displace state court responsibility for ordinary tort actions and violate the

traditional notions of comity which are fundamental to our federalism.

B. The Operation Of The Act Should Not Be Contingent On The Amount Of Insurance Carried By Shipowners.

The Court of Appeals held that state court proceedings against the captain of a vessel should be enjoined when the captain is insured under the same policy as the owner and the limits of available insurance exceed the amount of claims. This approach is fraught with major practical problems and adversely affects an injured person's remedies against negligent masters, officers and seamen.

If state court actions are enjoined until the conclusion of limitation proceedings, prejudicial delays are inevitable. For example, in this case the captain of the Pearl Kai died while the state court suit against him was enjoined. Petitioners never had an opportunity to depose him and have thus been deprived of crucial evidence regarding the cause of the Pearl Kai's port engine failure, the reasons for the captain's apparent inability to restart the port engine, and other valuable information on whether PARADISE knew or should have known of the problem with the port engine prior to the Pearl Kai's voyage of June 19, 1984. Proving fault on the part of the owner and charterer has been made more difficult by the death of the captain and Petitioners inability to depose him.

Delay adversely affects suits against masters, officers and seamen in other ways as well. It is common knowledge that when a case is delayed, evidence disappears, witnesses become difficult to locate, documents are lost

or misplaced, memories fade, and eventually the plaintiff is deprived of the evidence needed to prove his case and meet the burdens imposed by law.

The lower court's concern with the depletion of available insurance is misplaced and certainly does not justify enjoining the proceedings against the captain of the Pearl Kai. The availability of insurance has little to do with whether the owner of an offending vessel will be able to satisfy the claims against him. That depends on both insurance *and* the owner's assets. Accordingly, the availability of insurance has only a limited affect on an owner's ability to satisfy claims.

More importantly however, the Act was passed in 1851 before protective insurance was even available. G. Gilmore and C. Black, *The Law of Admiralty, supra.* at 843. Thus, Congress could not have intended that the operation of the Act be contingent on the amount or availability of insurance. As Circuit Court Judge Ferguson said in his well-reasoned dissent:

> Further, even if insurance protection were a general purpose of the Act, the stay here would not further such a purpose. If a judgment against the captain deprives the owner of some insurance protection, any ensuing dispute should be between the owner and the captain. The owner chose to share an insurance policy with the captain; the plaintiff should not have to pay for such a decision. Also, the existence or amount of insurance is irrelevant to the specific issues on this appeal; we do not even know if insurance covers this occurrence, or what the policy limits are. Finally, it is odd that the wish to protect an under insured owner controls our decision. I have

never heard of too little insurance being the basis for a court decision.

795 F.2d at 764.

C. The Decision Of The Court Of Appeals May Deprive Victims Of Maritime Accidents Of The Right To Trial By Jury.

Section 187 of the Act was plainly designed to give accident victims their choice of forum in actions against masters, officers or seamen. That choice has effectively been taken away by the Ninth Circuit. The Court of Appeals acknowledged that if limitation proceedings against a vessel owner are concluded before a state court action against a captain, claimants may be collaterally estopped from relitigating certain issues that were decided in the limitation proceeding and this may effectively deny claimants the right to trial by jury.[4] But while the Court

---

[4] On the issue of collateral estoppel, the District Court said: Staying the state court action "affects" the remedy to which claimant may be entitled in two ways. First, it would delay the resolution of the state court proceeding. Second, claimant might be collaterally estopped from the opportunity to try the issue of the captain's liability before a jury by virtue of findings made in the limitation proceeding.

619 F.Supp. at 26.

On the issue of collateral estoppel, the Court of Appeals said:

If claimants are permitted to proceed with their state court action prior to the limitation proceeding, there is a possibility that the state litigation will have some preclusive affect on issues in the limitation proceeding. We agree with the District Court that the result would be to frustrate this additional purpose of the Act and to relegate the limitation proceeding from its intended central role to a secondary position.

* * * *

(Continued on following page)

below recognized this problem, it implicitly found that the right to jury trial was less important than protecting a shipowner's insurance. It s respectfully submitted that an injured party's right to choose his forum and to resolve his claims against a negligent captain before a jury is of more importance than protecting a shipowner's insurance. This was obviously the view taken by Congress when it enacted § 187. Victims' rights, and particularly the right to jury trial, should not be taken away by judicial decree.

D. The Decision Of The Ninth Circuit Court Of Appeals Will Promote Wholesale Injunctions Against State Court Actions.

This Court has repeatedly stated that out of deference to the legitimate function of state courts, federal court should not enjoin state court proceedings except when absolutely necessary and the need is both great and immediate. See *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Fair Assessment In Real Estate Association v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). Given these considerations, it is difficult to understand how the Court of Appeals could hold that whether state court proceedings against the master of a vessel should be enjoined depends on the availability and the amount of insurance. State courts are fully competent to handle tort claims against the

---

(Continued from previous page)

Having concluded that the district court was empowered to grant a stay, we find that many of the same considerations support the district court's exercise of its discretion in this particular case. Permitting claimants here to proceed independently in state court before conclusion of the limitation action could work to the detriment of other injured parties and the shipowners through operation of collateral estoppel and depletion of the limitation fund.

795 F.2d at 762-63.

masters, officers, or seamen of a vessel. Their role and function in the resolution of disputes between injured parties and crew members should not be displaced by abstract concerns about the martialing of assets and the ability of shipowners to satisfy claims against them. Further, Congress plainly intended for accident victims to be allowed to pursue their state court remedies against masters, officers, and seamen. This is clear from the unambiguous wording of § 187 of the Act. And if the Court below was genuinely concerned about the depletion of the insurance fund, it could simply have ruled that petitioners are not entitled to *enforce* their judgment until the conclusion of the limitation proceeding but that the state court proceeding could be pursued to judgment. That would eliminate many of the concerns which the court had.

E. If Section 187 Of The Act Is To Be Construed At All, It Should Be Construed In The Most Narrow And Restrictive Manner.

The Court of Appeals candidly acknowledged that a literal reading of § 187 prohibits the injunction of state court actions against masters, officers or seamen. 795 F.2d at 762. However, the court concluded that such injunctions are not prohibited when § 187 is considered in relation to the purposes of the entire Act. *Id.* What the court failed to appreciate is that the Act is an "economic anachronism" which primarily benefits insurance companies rather than shipowners and that permitting injunctions does not further the purposes of the Act.

It is widely recognized that the conditions which led to the passage of the Act over a century ago no longer pre-

vail. *Maryland Casualty Co. v. Cushing, supra.* (opinion of Black, J.). The corporate form of business organization now provides investors in the shipping industry with an effective form of limited liability independent of the Act, and the availability of protective insurance makes the Act nothing less than an "economic anachronism". G. Gilmore and C. Black, *The Law of Admiralty, supra.* at 843.

In addition to being economically obsolete and unnecessary for the protection of shipowners, the Act is "widely regarded as unfair and unjust." *Id.* at 843. As Justice Black said in *Maryland Casualty Co. v. Cushing, supra.*:

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid the shipping industry, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.

Id. at 437, 74 S.Ct. at 623, 98 L.Ed.2d at 824.

The limitation principle has been "attacked by many and defended by almost none." G. Gilmore and C. Black, *The Law of Admiralty, supra.* at 843. Arguments for the repeal of the Act are commonplace and there is general agreement that if the Act is not repealed outright it should be given the most narrow and restrictive application. *Id.* As one commentator put it:

> An act which is vicious in its impact, unconscionable in its results and outmoded in an age of institutionalized protective insurance, if it cannot be repealed outright, deserves only a narrow, grudging and constrictive construction.

Comment, 24 *Nacca L. J.* 223, 225 (1959) quoted in G. Gilmore and C. Black, *The Law of Admiralty, supra.* at 822.

In their treatise on admiralty law, Gilmore and Black point out that judicial attitudes towards the Act are generally hostile:

> There is at least some reason to believe that the judicial attitude in the second half of the twentieth century will be on the whole hostile to the limitation idea, that the early cases will be whittled down if they are not flatly overruled, that the statute, even without further limiting amendments, will be narrowly and not expansively construed. Such an attitude reflects, it is suggested, not so much hostility to the shipping industry as a recognition of the fact that the Limitation Act, passed in the area before the corporation had become a standard form of business organization and before present forms of insurance protection (such as protection and indemnity insurance) were available, shows increasing signs of economic obsolescence.

G. Gilmore and C. Black, *The Law of Admiralty, supra.* at 822.

Gilmore and Black go on to state that it is surprising that the Act has managed to survive unscathed thus far, but that its prospects cannot be described as bright. They predict that one more major disaster where owners are entitled to limit their liability to a small fund should suffice to bring "the whole structure tumbling down." *Id.* at 823. And they predict that "[i]f a third edition of this book [*The Law of Admiralty*] is called for, the present chapter [Limitation of Liability] will in all probability be of no more than historical interest." *Id.* at 823.

A recent case, *Baldassano v. Larsen,* 580 F.Supp. 415 (D.Minn. 1984), illustrates the degree of judicial dissatisfaction with the Act. In *Baldassano* the court quoted

with approval Gilmore and Black's assessment of the Act as a "charter of irresponsibility for a few wealthy individuals" who are "granted a general license to kill and destroy." *Id.* at 418, *quoting* G. Gilmore and C. Black, *The Law of Admiralty, supra.* at 883. The Court went on to point out that since the conditions which led to the passage of the Act over a century ago no longer exist, the greatest beneficiaries under the Act today are not ship builders or investors, but insurance companies who are able to collect full premiums while limiting their liability to the value of the vessels they insure. *Id.* at 419. *See also, Petition of Porter,* 272 F.Supp. 282, 285 (S.D. Tex. 1967). The Court concluded that the entire situation created by the Act "cries out for remedial adjudication" because of the "fundamental unfairness of the law as it exists." *Id.* at 420.

The Court of Appeals' expansive interpretation of § 187 is completely and totally inappropriate. Section 187 does not require judicial construction; but if it is construed, the construction should be narrow and restrictive. Under no circumstances should the Act be expanded to give protection to masters of vessels whose negligence causes harm to others.

X. CONCLUSION

It is a matter of common knowledge that maritime disasters frequently involve loss of life or substantial property damage. When accidents occur, shipowners frequently seek protection under the Act. The Act has been used in a wide variety of circumstances including the sink-

ing of the "Titanic" and the grounding of the oil tanker "Tory Canyon." It is an extremely important part of maritime law, see 1 Norris, *The Law Of Maritime Personal Injuries,* § 140, at 273 (3d Ed. 1975), and it is extremely important that questions regarding the operation and scope of the Act be settled in a clear fashion by the nation's highest court.

Respectfully submitted,

DAVID C. SCHUTTER
Counsel of Record

GEORGE W. PLAYDON, JR.
ROBERT K. MERCE

Counsel for Petitioners TERRY LEE K. STONE, Individually; As Special Administratix of the Estate of PAUL HENRY STONE; and As Guardian Ad Litem For PAUL HENRY STONE, JR. and JEREMY NOAH KAMEALOHAOKUULEI STONE, minors

XI.

APPENDIX

In the Matter of The Complaint of PARADISE HOLDINGS, INC., a Hawaii corporation, as owner of, and Paradise Cruise, Limited, A Hawaii corporation, as lessee and charterer of the P/V PEARL KAI, Official Number 527 873, for exoneration from or limitation of liability.

Terry Lee K. STONE, Individually; As Special Administratrix of the Estate of Paul Henry Stone; and As Guardian Ad Litem for Paul Henry Stone, Jr., a minor, and Jeremy Noah Kamealohaokuulei Stone, a minor,

Claimants-Appellants,

v.

PARADISE HOLDINGS, INC. and Paradise Cruise, Limited,

Appellees.

Nos. 85-1648, 85-1889.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 27, 1986.

Decided July 25, 1986.

Cruise shipowners filed complaint for exoneration from and limitation of liability, seeking stay of state court actions arising out of death of body surfer in propeller of cruise ship, based on admiralty jurisdiction of federal courts. Claimants moved to dismiss limitation action for lack of admiralty jurisdiction and to dissolve stay of action against ship's captain. The United States District Court for the District of Hawaii, Pamela Ann Rymer, J., 619 F.Supp. 21, denied motions, and appeal was taken. The Court of Appeals, Canby, Circuit Judge, held that: (1) shallowness of water, reefs and state regulations prohibiting boating in area where accident occurred did not

preclude finding that waters were navigable for purposes of admiralty jurisdiction; (2) sufficient relationship to traditional maritime activity to support admiralty jurisdiction existed; and (3) district court did not abuse its discretion in extending limitation action to stay action against captain.

Affirmed.

Ferguson, Circuit Judge, filed opinion concurring in part and dissenting in part.

George W. Playdon, Jr., Robert K. Merce, Honolulu, Hawaii, for claimants-appellants.

Robert G. Frame, Leonard Alcantara, Alcantara & Frame, Honolulu, Hawaii, for appellees.

Appeal from the United States District Court for the District of Hawaii.

Before FERGUSON, CANBY and HALL, Circuit Judges.

CANBY, Circuit Judge:

On June 19, 1984, Paul Stone was killed while bodysurfing in a recreational area known as Point Panic, near Kewalo Basin in Honolulu. Boating is prohibited in Point Panic, and navigation is at best treacherous due to shallow water and large reefs. By contrast, the adjacent Kewalo Basin Channel is dredged and is an established shipping lane.

According to the allegations, at about noon on June 19, the P/V Pearl Kai, owned by Paradise,[1] entered the Channel on return from a Pearl Harbor cruise. The surf was high, and several hundred passengers were aboard. After its port engine failed, the ship was apparently turned broadside by a large incoming wave. In order to regain control of the vessel, the captain reversed the ship's starboard engine, backing the vessel into a group of body-surfers swimming in the Point Panic area. Several passengers and swimmers were injured, and Stone was killed. As a result of the incident, claims totalling more than $28 million were filed against the ship's owners and crew.

Stone's survivors filed an action in Hawaii Circuit Court against Paradise and the Pearl Kai's captain. Paradise then filed an action in federal court, under the Shipowners Limitation of Liability Act of 1851, 46 U.S.C. § 181-95 ("the Act"), seeking limited protection from the claims.[2] Jurisdiction was based on 28 U.S.C. § 1333. Paradise was granted an injunction staying prosecution of the state court action pending outcome of the federal proceeding.

---

[1]The ship was owned by Paradise Holdings, Inc., and chartered by Paradise Cruise Ltd. We refer to these appellees collectively as Paradise.

[2]The Act limits vessel owners' liability for claims, arising from acts performed by a ship's crew without the owner's knowledge or privity, to the owners' interests in the ship. If the ship's value is insufficient to satisfy all claims, the Act provides for equitable apportionment among the claimants. 46 U.S.C. § 184. Vessel owners must file a petition to limit liability in the appropriate federal district court within six months after a claimant notifies an owner of a claim. 46 U.S.C. § 185. For purposes of the Act, the charter of any vessel is deemed to be an owner. 46 U.S.C. § 186. Thus, Paradise Cruise Ltd. is also a limitation plaintiff.

On July 31, 1984, claimants moved to dismiss the limitation action for lack of admiralty jurisdiction. In addition, because their state action named the ship's captain as a defendant, they moved to dissolve the stay as violating 46 U.S.C. § 187.[3] 619 F.Supp. 21. Both motions were denied, and claimants appealed. The jurisdiction question was certified for interlocutory appeal under 28 U.S.C. § 1292(b); the other issue is appealable under 28 U.S.C. § 1292(a)(1). We affirm.

DISCUSSION

I. *Admiralty Jurisdiction*

A district court's decision that it has subject matter jurisdiction is reviewed *de novo*. *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341, 1343 (9th Cir. 1984). We conclude that the district court had jurisdiction.

To invoke the federal admiralty jurisdiction in tort cases, the tort must occur on navigable waters and bear a "significant relationship to traditional maritime activity." *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 672-75, 102 S.Ct. 2654, 2656-58, 73 L.Ed.2d 300 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454 (1972).

---

[3] 46 U.S.C. § 187 states in pertinent part:

> Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any . . . negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

A. *Navigable Waters*

Because of shallow water, reefs and state regulations prohibiting boating in the area, claimants argue that the waters of Point Panic are not navigable for purposes of admiralty jurisdiction. We disagree.

The waters in question are clearly subject to the ebb and flow of the tides. Throughout the nation's history, tidal waters have been held to be within the definition of "navigable waters." Indeed, until 1851 admiralty jurisdiction was limited to waters "within the ebb and flow of the tide." *The Steamboat Thomas Jefferson,* 23 U.S. (10 Wheat.) 428, 428, 6 L.Ed. 358 (1825).

Claimants argue that the tidal waters test was abolished in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851). That case, however, never held that tidal waters were not "navigable waters" for admiralty-jurisdiction purposes. Instead, it held that admiralty jurisdiction extended beyond tidal waters to all navigable waters. *See id.* 53 U.S. at 454-58. The Third Circuit has held squarely that *Propeller Genesee* involved only an expansion of admiralty jurisdiction and implied no contraction. *See United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 610 (3d Cir. 1974), *cert. denied,* 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975). We hold that in tidal waters, the ebb and flow of the tides remains the standard.

Claimants rely on cases that explore navigability on inland waterways, such as *Adams v. Montana Power Co.,* 528 F.2d 437 (9th Cir. 1975). There, we held that federal courts had no jurisdiction over a tort claim for loss suffered when the discharge from Hauser Dam capsized a small pleasure craft, drowning one person. The accident

occurred on a 25-mile stretch of the Missouri River dammed at both ends and situated entirely within the State of Montana. Only non-commercial fishermen, water skiers and pleasure boaters made use of the river. *Id.* at 439. We stated that "[a] waterway is navigable provided that it is used or susceptible of being used as an artery of commerce." *Id.* Because we concluded that none of the activities on the river constituted commerce, we held the action was not cognizable in admiralty. *Id.*[4] This ruling extends only to inland bodies of water and was not intended to alter the rule pertaining to tidal waters.

B. *Traditional Maritime Activity*

The second test for admiralty jurisdiction is whether the tort arose from traditional maritime activity. We have identified four factors as important in this determination: "(1) traditional concepts of the role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities involved; and (4) the causation and nature of the injuries suffered." *Solano v. Beilby,* 761 F.2d 1369, 1371 (9th Cir. 1985) (citing *Owens-Illinois, Inc. v. United States Dist. Ct.,* 698 F.2d 967, 970 (9th Cir. 1983) (per curiam)).[5] The principal

---

[4]Since *Adams,* the Supreme Court has made clear that the traditional maritime activity that is a prerequisite of admiralty jurisdiction need not be commercial activity. *See Richardson,* 457 U.S. at 674-75, 102 S.Ct. at 2658 (finding admiralty jurisdiction over a tort claim involving a collision of two pleasure boats).

[5]Claimants seem to argue for a fifth factor: whether the parties were engaged in commercial maritime activity. The argument is incorrect. First, the Pearl Kai clearly was involved in commercial activity at the time of the accident. It had hundreds of paying passengers on board. Second, the Supreme Court has made clear that the traditional maritime activity that is requisite for admiralty jurisdiction need not be *commercial* maritime activity. *Richardson,* 457 U.S. at 674-75, 102 S.Ct. at 2658.

focus of admiralty jurisdiction is "'the protection of maritime commerce.'" *Solano,* 761 F.2d at 1371 (quoting *Richardson,* 457 U.S. at 674, 102 S.Ct. at 2658).

At the outset, the parties dispute the proper method for applying these factors. Claimants seize upon a sentence from *Union Oil Co. v. Oppen,* 501 F.2d 558, 561 (9th Cir. 1974), which states: "[T]he 'activity' whose relationship to traditional maritime activity was to be examined was that of the injured party, not that of the tortfeasor." Their reliance on this statement is misplaced.

First, the statement is not a holding. It is an approximate paraphrase of a holding in a related case, *Oppen v. Aetna Insurance Co.,* 485 F.2d 252, 257 (9th Cir. 1973), and is included in *Union Oil* by way of background. The holding in *Aetna* was that the nature of the tortfeasors' activities is "not dispositive" of the traditional maritime activity issue. The *Aetna* court went on to hold that, because of the maritime nature of the plaintiffs' claim, the suit was cognizable in admiralty despite the arguably nonmaritime activities of the defendant that gave rise to the claim. 485 F.2d at 257. Thus, under *Aetna* it is more accurate to say that the focus should not be *solely* on the defendant's activities when making the "maritime activity" determination.

More important, the Supreme Court in *Richardson* stated that the focus should be on the "wrong" underlying the claim rather than on either party. 457 U.S. at 674, 102 S.Ct. at 2658. The Court stated: "Because the 'wrong' here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court." *Id.*

Applying the *Solano* factors, we conclude that, as in *Richardson,* the wrong alleged here is the negligent operation of a vessel in navigable waters. Because one of the traditional goals of admiralty jurisdiction is to ensure adherence to uniform "Rules of the Road" in the operation of boats, *see Richardson,* 457 U.S. at 676-77, 102 S.Ct. at 2659; *Executive Jet,* 409 U.S. at 269-70, 93 S.Ct. at 504-05, the alleged wrong has a traditional "maritime flavor" sufficient to invoke this jurisdiction. *See Owens-Illinois,* 698 F.2d at 970. The function and role of the ship and its crew were clearly maritime. The type of vehicle involved was a ship. Finally, injury was caused by contact with the ship's propeller and resulted from allegedly negligent operation of the ship. That decedent was swimming does not vitiate the traditional maritime nature of Paradise's wrong. *See Medina v. Perez,* 733 F.2d 170 (1st Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 778, 83 L.Ed.2d 774 (1985).[6] We conclude that there existed here a sufficient relationship to traditional maritime activity to support admiralty jurisdiction.

II. *Staying the State Court Proceedings*

The decision to grant a stay or injunction is normally reviewed for abuse of discretion. *SEC v. Carter Hawley*

---

[6]In *Medina,* two swimmers were injured when they were struck by a small outboard-powered pleasure boat as they were swimming about 120 feet off shore at a public beach in Puerto Rico. Applying *Richardson,* the court found the case cognizable in admiralty. Indeed, the First Circuit appears to have adopted an almost *per se* rule that admiralty jurisdiction lies when the wrong involved is negligent navigation of a vessel on navigable water. *See Medina,* 733 F.2d at 171. We need not decide the outer limits of admiralty jurisdiction here; we conclude simply that this case is within the district court's jurisdiction under 28 U.S.C. § 1333.

Hale Stores, Inc., 760 F.2d 945, 947 (9th Cir. 1985). The threshold issue here is whether 46 U.S.C. § 187 deprives a district court of power to stay state proceedings against a ship's master, officers, or crew pending disposition of a limitation proceeding brought by the owners. Because this question is one of statutory interpretation, *de novo* review is appropriate. *See Southeast Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305, 1309 (9th Cir. 1983).

As we have said, the Act permits a shipowner not personally at fault to limit his liability to his interest in his ship. Its purpose is to encourage shipbuilding, to promote investment in ships and employment of ships in commerce, and to place American shipping interests on an equal footing with that of other maritime nations. *See generally* 3 A. Jenner, B. Chase & J. Loo, *Benedict on Admiralty* §§ 6-7, at 1-42 to 1-47 (7th ed. 1985); 2 M. Norros, *The Law of Seamen* § 30:47, at 538-40 (4th ed. 1985).

The Act provides for all claims against an owner to be aggregated and decided at one time under a single set of substantive and procedural rules, thereby avoiding inconsistent results and repetitive litigation. *See Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 414-16, 74 S.Ct. 608, 610-12, 98 L.Ed. 806 (1954) (plurality opinion). This objective is especially important where there are multiple claims, which aggregate to more than the limitation fund; the *concursus* before the admiralty court is designed in part to marshall available assets and to set priorities among the various claims. *S & E Shipping Corp. v. Chesapeake & Ohio Railway Co.*, 678 F.2d 636, 642 (6th Cir. 1982). Limitation actions are equitable proceedings in

which courts must consider "the rights of all claimants in addition to . . . the rights of the insureds and the insurors." *New York Marine Managers v. Helena Marine Service,* 758 F.2d 313, 316 (8th Cir.) (per curiam), *cert. denied,* — U.S. —, 106 S.Ct. 148, 88 L.Ed.2d 122 (1985).

Procedurally, limitation actions brought under the Act are governed by Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F. Once an owner, who is subject to a claim against his ship, files a limitation complaint and posts appropriate security, he is generally entitled to an injunction enjoining "the further prosecution of an action or proceeding against the [owner] or his property with respect to any claim subject to limitation in the action." Rule F(3). This provision applies to both state and federal proceedings. Indeed, an admiralty court is generally acknowledged to possess broad injunctive power to ensure the "orderly and effective operation of the Limitation Act." *Olympic Towing Corp. v. Nebel Towing Co.,* 419 F.2d 230, 235 (5th Cir. 1969), *cert. denied,* 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970), *overruled on other grounds, Crown Zellerbach Corp. v. Ingram Industries, Inc.,* 783 F.2d 1296 (5th Cir. 1986) (en banc); *accord Guillot v. Cenac Towing Co.,* 366 F.2d 898, 904-07 (5th Cir. 1966).

We have recognized, however, that an injunction against actions outside of the limitation proceeding may deprive a victim of a jury trial to which he or she is otherwise entitled. *Newton v. Shipman,* 718 F.2d 959, 962 (9th Cir. 1983). We have accordingly held that a victim's choice of forum will not be disturbed by a limitation proceeding when there is only one claimant, or when the aggregated claims total less than the limitation fund. *Id.;*

accord S & E Shipping, 678 F.2d at 643. In these situations, permitting a claimant to proceed against the owner outside of the limitation action cannot work to the prejudice of the owner or of other claimants.

Claimants here argue that they have a much broader right to pursue their state court action without interruption. They contend that 46 U.S.C. § 187 by its terms flatly prohibits the stay of a state court proceeding against the captain, officers or crew of a ship. The question is for us one of first impression.

Paradise does not contest claimants' right ultimately to pursue the captain in state court, and the injunction does not "take away" this remedy. The injunction does, however, delay the state court remedy and possibly subjects it to the preclusion of some issues by reason of the intervening admiralty litigation. Claimants contend that the stay consequently does "affect the remedy . . . against the master" within the meaning of the express prohibition of section 187. Although this argument has considerable literal appeal, we conclude that it is not a proper construction of section 187, when that statute is considered in relation to the entire Limitation of Liability Act.

A major purpose of the Act is to permit the shipowner to retain the benefit of his insurance. The Supreme Court established this proposition in *Maryland Casualty Co. v. Cushing,* 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954). In that case, Justice Frankfurter, speaking for a plurality of four, stated that a direct action against insurers in state court could not be permitted to proceed prior to limitation proceedings because the effect would be that the "shipowner and charterer would then have to face what-

ever claims may be presented stripped of their insurance protection." *Id.* 347 U.S. at 418, 74 S.Ct. at 613. Justice Clark, joining in the judgment, stated that Congress intended by the Act to permit shipowners to indemnify themselves by insurance. *Id.* at 423-24, 74 S.Ct. at 615-16 (Clark, J., concurring). The four dissenters vigorously disputed this view, *id.* at 432-37, 74 S.Ct. at 620-22 (Black, J., dissenting), but they did not prevail. *Cushing* therefore establishes that "[t]he reason for requiring the limitation proceeding to be completed first is to permit the vessel owner to receive the benefit of his insurance." *Olympic Towing*, 419 F.2d at 235 n. 17.

This major purpose of the Act could be frustrated if claimants' action against the captain here were not stayed. Claimants seek in excess of $23 million in damages. Other claimants in the limitation proceeding have asserted more than $1.2 million in claims. The value of the ship is stated to be $625,000. Claimants in opposing the stay in district court submitted an affidavit that the shipowner had liability insurance of at least $3 million, which covered the captain as a named insured. In their brief in this court, claimants state that there may be as much as $9 million in insurance. That figure is still far short of claimants' claim. If claimants successfully pursued their state court remedy prior to the limitation proceeding, the danger of depletion of the insurance coverage would clearly exist. The result would be to deprive the shipowner of insurance protection in the limitation proceeding. When that danger exists, the district court is not precluded by section 187 from staying the state court action against the captain. To read section 187 otherwise would frustrate a

major congressional purpose underlying the Limitation of Liability Act.

As we observed, the Act is also designed to aggregate all claims against a shipowner so that they may be decided at one time under substantive and procedural rules of admiralty law. *See Cushing*, 347 U.S. at 414-16, 74 S.Ct. at 610-12. If claimants are permitted to proceed with their state court action prior to the limitation proceeding, there is a possibility that the state litigation will have some preclusive effect on issues in the limitation proceeding. We agree with the district court that the result would be to frustrate this additional purpose of the Act and to relegate the limitation proceeding from its intended central role to a secondary position. Again, we cannot read section 187 in isolation from the rest of the Act. We must construe the entire statute in a manner that best promotes each of Congress' goals.

While it has never faced the factual situation before us, the Fifth Circuit has recognized the need for flexibility in interpreting section 187. *See Olympic Towing Corp.*, 419 F.2d at 235; *cf. Guillot*, 366 F.2d at 904-09 (shipowner's corporate officers). Like *Cushing*, these cases involved potential conflicts between the Act and the Louisiana direct action statute. The various claimants argued that they should be allowed to proceed against insurers directly in separate actions without having to await the outcome of the limitation proceedings. The court, recognizing the potential conflicts between the statutes, found that the best resolution was to stay the direct action against the insurers until the limitation action was completed. In that way, the state legislature's intent in enacting the

direct action statute could be preserved from Supremacy Clause attack, while the "valuable right" to limit owner liability, *Guillot*, 366 F.2d at 907, is likewise preserved. *See Cushing*, 347 U.S. at 423-27, 74 S.Ct. at 615-17 (Clark, J., concurring); *Olympic Towing*, 419 F.2d at 234-35; *Guillot*, 366 F.2d at 905.

This compromise approach was employed by the district court in *In re Spanier Marine Corp.*, 1983 A.M.C. 2441, 2442-43 (E.D.La.1983), a case factually similar to the case at bar. The *Spanier* court stayed an action against a ship's captain in state court pending outcome of the limitation action. No direct action statute was involved. Like the district court here, the court found that permitting the state action to continue raised the spectre of collateral estoppel problems and depletion of the limitation fund to the detriment of other claimants.[7]

We conclude, therefore, that it is sometimes inconsistent with the purposes of the Act to permit some limitation-action claimants to proceed in state court against a ship's captain and crew in advance of an equitable division of the limitation fund among all potential claimants. We hold that in such cases, a district court has discretion to stay the state action or otherwise to shape the limita-

---

[7]Claimants rely on the district court decision in *In re Brent Towing Co.*, 414 F.Supp. 131 (N.D. Fla. 1975). We do not consider that case helpful. In *Brent Towing*, the court enjoined an action against the vessel's owners outside of the limitation proceeding. At the same time, the court, without analysis stated that nothing in its order "is to be construed as precluding separate suits against the masters, officers and crew . . ." of the ship. *Id.* at 133. Unfortunately, the decision simply does not discuss whether any separate actions could be *stayed* pending resolution of the limitation proceeding.

tion proceedings in a manner that promotes the purposes of the Act.[8]

Having concluded that the district court was empowered to grant a stay, we find that many of the same considerations support the district court's exercise of its discretion in this particular case. Permitting claimants here to proceed independently in state court before conclusion of the limitation action could work to the detriment of other injured parties and the shipowners through operation of collateral estoppel and depletion of the limitation fund. The district court's approach was a reasonable compromise between the competing goals of preserving the state forum for a jury adjudication of some maritime claims and the federal policy of limiting owner liability. There was no abuse of discretion.

AFFIRMED.

FERGUSON, Circuit Judge, concurring in part and dissenting in part:

I agree that admiralty jurisdiction exists in this action. I would vacate the district court's stay of the state court action, however, because the stay vitiates the pur-

---

[8]Some courts and commentators have criticized that the Act as constituting an anachronism in this day of insurance. *See, e.g., Baldassano v. Larsen*, 580 F.Supp. 415, 418 (D. Minn. 1984); G. Gilmore & C. Black, *The Law of Admiralty* §§ 10-4 to 10-4(a), at 821-23 (2d ed. 1975). Because of this hostility to the Act, claimants urge the court to construe Section 187 as broadly as possible. An excellent argument can be made that the Act is outdated and should be repealed. That contention, however, is for Congress, not this court, to address. We must accept the Act and its purpose of limiting liability; the question is whether the proper effectuation of that purpose necessitates or permits a stay of claimants' action against the captain in state courts despite the strictures of section 187.

poses of 46 U.S.C. § 187. Furthermore, the equities in this case weigh against creating an exception to the Act.

I.

The Shipowners Limitation of Liability Act of 1851, 46 U.S.C. §§ 181-196 ("Act"), applies when a shipowner receives notice of claims against it based on tortious acts of the ship's crew of which the owner did not know and should not have known. In such a case, the owner may petition the federal court to limit the amount of its liability to the value of the vessel involved. The statute does not address the merits of any action establishing liability; it only limits the amount of the owner's liability and allows the court to stay further proceedings against the owner with respect to any claims subject to the limitation statute.

The Act contemplates only stays of litigation against the owner. This stay is not within the scope of the Act because it stays an action against the vessel's captain. Because the Act's language refers only to litigation against the owner, and not to actions against the captain, I would vacate it.

The majority admits that this argument has "considerable literal appeal." Maj. op. at 762. The majority also admits that Rule F(3) states only that it permits enjoining proceedings against the owner. Maj. op. at 761. Thus, I fail to see how the majority reaches the conclusion that the stay does not violate the statute. The majority applies rules of statutory construction that are appropriate only if a statute is ambiguous. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, — U.S. —, 105 S.Ct. 2587, 2595, 86 L.Ed.2d 168 (1985). Because

the Act is clear and unambiguous, the majority should follow its terms.

II.

I also disagree with the majority's conclusion that this stay furthers the Act's underlying purposes. The circumstances here do not affect the first three purposes cited by the majority: to encourage the shipbuilding, to promote investment in and use of ships, and to place American shipping interests on an equal footing with other maritime nations, Maj. op. at 761. Investing in and using ships rather than other modes of transportation are not affected by a tour boat in Pearl Harbor. Further, a small tour boat used only in Pearl Harbor does not affect international shipping. Finally, if a stay of litigation involving a small tour boat can be said to further the Act's purposes, I am not sure where to draw the line. At a touring sailboat? An outrigger canoe rented from the Hilton Hotel on Waikiki Beach?

The other purpose cited by the majority, protection of the owner's insurance, Maj. op. at 761-762, does not exist for any state except Louisiana, which allows actions directly against insurance companies. The majority's reliance on *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954), and circuit court cases involving Louisiana law, Maj. op. at 762-763, is therefore unpersuasive. The only reason for the anomalous result in Louisiana cases is that, in that state, a plaintiff directly sues the insurer, so that there will never be a lawsuit against an insured owner. The Limitation Act did not contemplate the direct-action situation, so that such an exception is justified for that narrow purpose.

That is not the case here. *See In re Brent Towing Co.*, 414 F.Supp. 131, 133 (N.D.Fla.1975) ("The claimants need no permission of the court to proceed against [the masters, officers, and crew].").

Further, even if insurance protection were a general purpose of the Act, the stay here would not further such a purpose. If a judgment against the captain deprives the owner of some insurance protection, any ensuing dispute should be between the owner and the captain. The owner chose to share an insurance policy with the captain; the plaintiff should not have to pay for such a decision. Also, the existence or amount of insurance is irrelevant to the specific issues on this appeal; we do not even know if insurance covers this occurence, or what the policy limits are. Finally, it is odd that the wish to protect an underinsured owner controls our decision. I have never heard of too little insurance being the basis for a court decision.

III.

Even if I agreed with the majority that some cases might justify exceptions to the statute, no such equities exist here. In fact, the equities involved weigh against the stay.

First, the principles of federalism caution against prohibiting this type of case from proceeding in state court before any liability has been established. Section 187, which instructs federal courts not to enjoin state court actions against parties other than the owner, seems to me to "reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism.'" *Fair Assessment in Real Estate As-*

sociation v. McNary, 454 U.S. 100, 103, 102 S.Ct. 177, 179, 70 L.Ed.2d 271 (1981). Although *McNary* dealt with state taxes,

> [t]he principle of comity has been recognized and relied upon by this Court in several recent cases dealing with matters other than state taxes. Its fullest articulation was given in the now familiar language of *Younger v. Harris,* 401 U.S. 37 [91 S.Ct. 746, 27 L.Ed.2d 669] (1971) . . . .
>
> > "[T]he concept [of comity] [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Id.* [401 U.S.] at 44-45 [91 S.Ct. at 750-751].

454 U.S. at 111-12, 102 S.Ct. at 183-84.

Second, the majority declares that the stay merely "delays" the state action. However, mere "delay" can have substantial effects on the state litigation. In this case, for example, the captain of the vessel died after the stay issued. Given the breadth of this stay, the plaintiffs would have been unable to depose the captain had they known of his failing health: such "proceeding" with the case would violate the stay. As a result of the "mere delay," the plaintiff lost valuable testimony.

IV.

The Act prohibits the district court's stay and no equities exist to find an exception to the Act. I would vacate the stay.

In the Matter of the Complaint of PARADISE HOLDINGS, INC., a Hawaii corporation, as owner of, and Paradise Cruise, Limited, a Hawaii corporation, as lessee and charterer of the P/V PEARL KAI, Official Number 527 873, for exoneration from or limitation of liability.

No. CV 84-0783 PAR.

United States District Court,
C.D. California.

Dec. 26, 1984.

Cruise ship owners filed complaint for exoneration from and limitation of liability, seeking stay of state court actions arising out of death of body surfer in propeller of cruise ship, based on admiralty jurisdiction of federal courts. The District Court, Rymer, J., held that: (1) waters reserved by the state of Hawaii for recreational purposes, which were adjacent to channel used by cruise ship, where "navigable waters" for purposes of admiralty jurisdiction; (2) relationship between body surfer's death and traditional maritime activities was sufficient to invoke admiralty jurisdiction; and (3) policy behind Limitation of Liability Act required stay of state court proceedings against the captain, as well as against cruise ship owners, notwithstanding contrary literal reading of statute.

So ordered.

David Schutter, Schutter, Cayetano & Playdon, Honolulu, Hawaii, for claimant Terry Stone.

Robert Frame, Alcantara & Frame, Honolulu, Hawaii, for limitation plaintiffs, Paradise Holdings, Inc. and Paradise Cruise, Ltd.

MEMORANDUM OF DECISION AND ORDER

RYMER, District Judge.

This case arises from the death of Paul H. Stone who was killed while body surfing near the Kewalo Basin in Honolulu. According to the complaint filed in Hawaii state court by Stone's widow and minor children, the captain of the Pearl Kai, a commercial cruise ship, piloted the craft in high surf conditions in the vicinity of a number of body surfers. Returning from a Pearl Harbor cruise, the ship was turned broadside to an incoming wave. In order to gain control of the vessel, the captain allegedly reversed the engine, backing the ship into a group of body surfers. The propeller struck Stone repeatedly, killing him instantly.

The state court action names Paradise Holdings Corp., Paradise Cruise Ltd. and the Pearl Kai's captain, Edward Bruhn, as defendants. It alleges negligence, gross negligence, assault and battery and infliction of emotional distress and seeks $23 million in compensatory and punitive damages.

Pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 183 *et seq.* ("the Limitation Act"), Paradise Holdings Corp. and Paradise Cruise Ltd. filed a Complaint for Exoneration from and Limitation of Liability in federal district court in Hawaii. The complaint, based on the admiralty jurisdiction of the federal courts, requested a stay of all state court proceedings against Paradise Holding Corp. and Paradise Cruise, Ltd. and the issuance of a restraining order and notice to claimants directing them to file their claims in the federal court proceeding. District Judge Harold M. Fong ordered the stay and issued the

restraining order and notice. Under the Limitation Act, the liability of the ship's owner for injury or damage cannot exceed the value of the vessel. 46 U.S.C. § 183. In this case, the Pearl Kai is estimated to be worth $625,000, an amount which would also be applied to remedy injuries allegedly sustained by other body surfers and the ship's passengers. In addition to the claimants' action, over $1.2 million in claims have been filed by others as a result of the accident.

Decedent's survivors [hereinafter referred to as claimant] move to dismiss the complaint for limitation of liability on the ground that the death of a body surfer is not within the admiralty jurisdiction of this Court. Alternatively, claimant seeks to modify the restraining order to allow the state court action to proceed against the ship's captain, on the ground that they have an absolute statutory right to do so under 46 U.S.C. § 187. These issues are considered in turn.

1. *Admiralty Jurisdiction.*

Federal admiralty jurisdiction over maritime torts is provided by 28 U.S.C. § 1333 which states:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitor in all cases all other remedies to which they are otherwise entitled."

Congress has specifically extended admiralty jurisdiction to cases arising from injuries suffered on navigable waters. In the Extension of Admiralty Jurisdiction Act, Congress provided:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

46 U.S.C. § 740.

Prior to the Supreme Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), admiralty jurisdiction would have almost certainly covered this suit. Before *Executive Jet,* admiralty jurisdiction over tort cases traditionally depended on the locality of the wrong. If the wrong took place in navigable waters, admiralty jurisdiction was properly invoked. If the wrong occurred on land, or in non-navigable waters, admiralty jurisdiction was lacking. Although there existed authority to the contrary, the general rule was that any tort occurring on the high seas or navigable waters was cognizable in admiralty jurisdiction. *See* 1 Benedict, *Admiralty,* § 2.

However, the unanimous decision in *Executive Jet* held that, at least with respect to aviation torts, the locality of the wrong in itself was not sufficient to invoke admiralty jurisdiction. *Id.* at 261, 93 S.Ct. at 501. *Executive Jet* involved the crash of a jet aircraft on takeoff into the navigable waters of Lake Erie. The Court reviewed the criticism of the locality rule to admiralty jurisdiction and noted the "absurd" results that the locality rule would yield when applied mechanically. For example, the Court observed that "if a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom. . . . a literal application of the locality test invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well." *Id.* at

255, 93 S.Ct. at 498. The Court held that with respect to claims arising from airplane accidents, the alleged wrong must occur in navigable waters and "bear a significant relationship to traditional maritime activity." *Id.* at 267, 93 S.Ct. at 504.

While *Executive Jet* was limited on its facts to aviation accidents, in *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), the Court considered whether admiralty jurisdiction could be properly asserted in an action to recover for a death resulting from the collision on a navigable river of two boats used exclusively for recreational use. The Court extended the holding of *Executive Jet* to torts in a maritime context, concluding that "[b]ecause the 'wrong' here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty juridiction in the District Court." *Id.* at 2658. The Court also held, despite a sharp dissent, that "there is no requirement that 'the maritime activity be an exclusively commercial one.' " *Id.* at 2658.

In applying the *Foremost* test here, the parties initially dispute whether the wrong complained of occurred in navigable waters. Claimant contends that the body surfing area known as Point Panic, where Stone's death is alleged to have occurred, is not in navigable waters because it is a recreational area and not "an artery of commerce." Point Panic is immediately adjacent to the channel leading into the Kewalo Basin and is reserved by the State of Hawaii as a site primarily for swimming and body surfing. See Hawaii Admin. Rules § 19-85-14. The Kewalo Basin is used as a harbor by private pleasure boats as well as commercial cruise ships. A dredged channel approximately

210 feet in width leads from the Pacific Ocean through the coral reefs to the Basin. (Gray Decl., ¶ 4.) The channel is marked by navigational aids maintained by the United States Coast Guard. (Richards Decl., ¶ 5.) According to claimant's state court complaint, the Pearl Kai was swept broadside by a large wave while entering the Kewalo Basin channel. Its captain then backed the vessel into the body surfing area where the accident occurred.

A. *Navigability of the Point Panic Area.*

For purposes of admiralty jurisdiction, navigable waters include those which are "used or susceptible of being used as an artery of commerce." *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L.Ed. 1058 (1852); *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n. 7, 100 S.Ct. 383, 389 n. 7, 62 L.Ed.2d 332 (1979); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir.1975) *citing The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1871). In this country's early history and perhaps owing to the British heritage of our jurisprudence, admiralty jurisdiction was determined by whether the waters were subject to the ebb and flow of the tides. *See e.g. The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 6 L.Ed. 358 (1825). Although *The Propeller Genesee Chief* and *The Daniel Ball* have been read to overrule the ebb-and-flow test, there is some question whether that test is truly extinct today. In *United States v. Stoeco Homes, Inc.*, the Third Circuit held that in tidal water, the test for admiralty jurisdiction remains the ebb and flow of the tide. 498 F.2d 597, 610 (3d Cir.1974). *See also Otto v. Alper*, 489 F.Supp. 953, 954 n. * (D.Del.1980) ("In tidal waters no showing of actual or potential navigability is required."

However, under either definition the allegedly tortious conduct occurred in navigable waters. Clearly, the waters in question, in the Pacific Ocean approximately 70 yards from the shoreline, are subject to the ebb and flow of the tides. In addition, the area's proximity to the channel and ocean-going traffic makes it susceptible to commercial use, particularly during high surf conditions.

Claimant relies on *Adams v. Montana Power Co., supra,* for the proposition that waters which are used as a practical matter, for recreational purposes cannot support admiralty jurisdiction. In *Adams,* the court considered whether a portion of the Missouri River wholly within Montana and dammed at both ends was navigable water for purposes of admiralty jurisdiction. The trial court found that the section of the river in question was used only by non-commercial fishermen, water skiers and pleasure boaters. *Adams, supra* at 439. Of paramount importance to the Ninth Circuit was the fact that there was no federal interest where the body of water lacked commercial activity. The court observed:

> "The purpose behind the grant of admiralty jurisdiction was the protection and promotion of the maritime shipping industry through the development and application, by neutral federal courts, of a uniform and specialized body of federal law. [citation, footnote omitted] The strong federal interest in fostering commercial maritime activity outweighed the interest of any state in providing a forum and applying its own law to regulate conduct within its borders. It follows that admiralty jurisdiction need and should extend only to those waters traversed or susceptible of being traversed by commercial craft. In the absence of commercial activity, present or potential, there is no ascertainable federal interest justifying the frustration of legitimate state interests." 528 F.2d at 439.

Because the river had no commercial activity, present or potential, there was no federal interest in exercising admiralty jurisdiction. *Id.* at 440.

Here, the accident which gave rise to this lawsuit amply demonstrates that the Point Panic waters are capable of being used by commercial traffic under some circumstances. That the Point Panic area is an area reserved primarily for recreational water sports does not alter the fact that it is used or susceptible to use as a commercial waterway at certain times. The efforts of the United States Coast Guard to maintain the navigability of the channel leading to the Kewalo Basin as well as other harbor areas in Honolulu is further evidence of the strong federal interest in uniform rules of navigation in a commer maritime context. (See Gray, Richards Decls.)

Adams has been construed by some courts as requiring present, actual commercial activity before admiralty jurisdiction is properly invoked. *See Livingston v. United States,* 627 F.2d 165 (8th Cir.1980); *Chapman v. United States,* 575 F.2d 147 (7th Cir.1978) (en banc) *cert. denied* 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978). But *Adams* does not require systematic commercial traffic before admiralty jurisdiction will attach. The circuit's decision clearly allows for the exercise of admiralty jurisdiction where there is "potential" commercial activity. In this case, the proximity of Point Panic to the Kewalo Basin and a busy harbor which routinely convey commercial transportation provides the requisite "potential" or "susceptibility" to warrant admiralty jurisdiction.

Moreover, it is consistent with the federal interest in uniform rules of conduct and liability that admiralty juris-

diction not depend on the actual presence of commercial shipping. To do so would subject shipping interests to varying rules and standards of liability depending only on whether commercial vessels traverse an area routinely. The federal interest in uniform maritime transportation would depend to a large extent on traffic patterns of commercial vessels. "Finding admiralty jurisdiction . . . where the water bodies are potential . . . highways of commerce because they are susceptible to or capable of such use, serves the purpose of making uniform rules of conduct, including the navigational rules, 'Rules of the Road,' light requirements, etc., applicable to all interstate maritime traffic, whether commercial or pleasure." *Finneseth v. Carter*, 712 F.2d 1041, 1046-47 (6th Cir.1983). Because the Point Panic area has been used on at least this occasion and is susceptible to use by commercial maritime traffic, it constitutes navigable waters for purposes of admiralty jurisdiction.

B. *Relationship Between the Wrong an Traditional Maritime Activities.*

The second prong of the *Foremost* test is also met here. By analyzing the relationship of the "wrong" to "traditional maritime activity," the *Foremost* test focuses the inquiry on the allegedly tortious conduct. *But see Union Oil Co. v. Oppen*, 501 F.2d 558, 561 (9th Cir.1974) ("the 'activity' whose relationship to traditional maritime activity was to be examined was that of the injured party, not that of the tortfeasor.") In *Foremost*, the wrong was the negligent operation of a recreational vessel on navigable waters and it was held to have a sufficient nexus to traditional maritime activity to justify admiralty jurisdic-

tion. Here, the wrong complained of is the allegedly negligent operation of a commercial cruise ship returning to its harbor. As in *Foremost,* such conduct is a traditional maritime activity and admiralty jurisdiction is therefore properly invoked.

In *Owens-Illinois, Inc. v. United States District Court,* the Ninth Circuit considered four factors to determine if an alleged tort bears a significant relationship to traditional maritime activity: (1) traditional concepts of the role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities involved; (4) the causation and nature of the injury suffered. 698 F.2d 967, 970 (9th Cir.1983).

Applying these factors, it is beyond doubt that one role of admiralty law is to redress injuries caused by the navigation of a commercial ship in navigable waters. The negligent piloting of a commercial craft has the "maritime flavor" necessary to support admiralty jurisdiction. *Owens-Illinois,* 698 F.2d at 970. Also, the role of the ship, its owners and pilot is wholly of a maritime character. Similarly, the cruise ship and the instrumentality of the injury, its propeller, are maritime in nature. Although the decedent was not on a ship, his purposeful presence in navigable waters adds to the maritime character of the accident. Finally, the nature of the injury, contact with the propellor, and its alleged cause, the negligent operation of the Pearl Kai, have a substantial maritime connection. Thus, under the four part test articulated in *Owens-Illinois,* the tort alleged bears a relationship to traditional maritime activity sufficient to establish admiralty jurisdiction.

Cases where injuries to swimmers were held to be inappropriate to sustain admiralty jurisdiction, *see Crosson v. Vance,* 484 F.2d 840 (4th Cir. 1973); *Marroni v. Motey,* 492 F.Supp. 340 (E.D.Pa.1980); *Jorsch v. LeBeau,* 449 F.Supp. 485 (N.D.Ill.1978); *Webster v. Roberts,* 417 F. Supp. 346 (E.D.Tenn.1976); *Medina v. Perez,* 575 F.Supp. 168 (D.P.R.1983) *rev'd* 733 F.2d 170 (1st Cir.1984), involved collisions between a swimmer and pleasure boat and were decided before *Foremost* made clear that non-commercial, recreational vessels could be subject to admiralty jurisdiction. "There is no requirement that two vessels be involved in order to create admiralty jurisdiction . . . The actor in this case was a vessel and that is enough. Once given that defendant's boat is not excluded because non-commercial, it should make no difference that plaintiffs were in navigable waters rather than on them." *Medina,* 733 F.2d at 171. *See also Kuntz v. Windjammer Cruises, Ltd.,* 573 F.Supp. 1277 (D.Pa.1983) (admiralty jurisdiction appropriate where civil action arose from negligence of crew of a commercial vessel leading to death of fee paying passenger); *Moye v. Henderson,* 496 F.2d 973 (8th Cir.1974) (the operation of a boat on navigable waters, no matter what its size or activity, is a traditional maritime activity to which admiralty jurisdiction attaches).

II. *Modification of the Restraining Order.*

On July 17, 1984, Judge Fong issued the stay and restraining order enjoining prosecution of suits against plaintiffs Paradise Holdings, Inc. and Paradise Cruise, Ltd. arising from the accident. The court ordered:

> "that the continued prosecution of any and all suits, actions and proceedings which may have already be-

gun against the Plaintiffs in any Court whatsoever to recover damages arising out of, or occasioned by, or consequent upon, the aforesaid accident or otherwise arising during the voyage in which the P/V Pearl Kai was then engaged, and the institution and prosecution of any suits, action or legal proceedings of any nature or description whatsoever in any court whatsoever, except in this proceeding for exoneration from or limitation of liability, against Plaintiffs with respect to any claim or claims arising out of the aforesaid accident or otherwise arising during the voyage on which the P/V Pearl Kai was then engaged, or otherwise subject to limitation in this proceeding, be, and the same hereby are stayed and restrained . . ."

Pending in state court is the action filed by claimant against the captain of the Pearl Kai, Edward Bruhn, and Paradise Holdings, Inc. and Paradise Cruise, Ltd. The ship's captain is not a plaintiff in the limitation proceeding in federal court and, literally read, the restraining order is inapplicable to him. Nevertheless, claimant believes the restraining order to be susceptible to an interpretation that would restrain all actions arising from the accident and would therefore bar their suit against the captain. Moreover, claimant asserts that § 187 of the Limitation Act provides a statutory right to proceed against the captain in state court. Section 187 states:

"Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away responsibility to which any

> master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

46 U.S.C. 187.

On the other hand, plaintiffs contend that for policy reasons underlying the Limitation Act, the restraining order must apply to the state court action against the captain. Specifically, plaintiffs argue that to allow the state court to decide issues of liability and damages would defeat the purpose and effectiveness of the Limitation Act as a whole. This case is complicated by two factors: first, there are multiple claims which exceed both the value of the ship and the amount of insurance available; and second, claimant indicates that plaintiffs carried $3 million in liability insurance which names the captain as an insured.

Read in isolation, § 187 indicates that the action in state court against the captain of the Pearl Kai should not be enjoined. Staying the state court action "affects" the remedy to which claimant may be entitled in two ways. First, it would delay the resolution of the state court proceeding. Second, claimant might be collaterally estopped from the opportunity to try the issue of the captain's liability before a jury by virtue of findings made in the limitation proceeding.

However, § 187 must be construed in concert with the Limitation Act and its purposes. The Limitation Act furthers several purposes. In addition to limiting the liability of shipowners, the Limitation Act aims "to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants." *Maryland*

Casualty Co. v. Cushing, 347 U.S. 409, 415, 74 S.Ct. 608, 611, 98 L.Ed. 806 (1954). It does so by collecting all claims before one tribunal to be adjudicated on one set of facts. In the process, repetitive litigation and inconsistent results are avoided. *Id.* Even more importantly, the limitation proceeding allows the equitable distribution of an inadequate fund among claimants by marshalling assets. *Maryland Casualty Co. v. Cushing,* 347 U.S. 409, 417, 74 S.Ct. 608, 612, 98 L.Ed. 806 (1954); *Pershing Auto Rentals, Inc. v. Gaffney,* 279 F.2d 546, 551 (5th Cir.1960).

To allow the claimant to sue the captain in state court would adversely affect the limitation proceeding in several ways. First, if the captain is indeed a named insured under the plaintiff's liability insurance, a judgment against the captain could endanger the insurance fund to the detriment of those claimants whose rights will be determined in the limitation proceeding. *See In the matter of Spanier Marine Corp.,* 1983 A.M.C. 2441 (E.D.La.1983) (pursuing the insurance carrier could indirectly exhaust the vessel owner's insurance and interfere with and possibly defeat the whole limitation proceeding); *Olympic Towing Corp. v. Nebel Towing Co.,* 419 F.2d 230, 235 n. 17 (5th Cir.1969) ("the reason for requiring the limitation proceeding to be completed first is to permit the vessel owner to receive the benefit of his insurance.")

In this case, claimant seeks damages in excess of $24 million. Other claimants in the limitation proceeding have asserted over $1.2 million in claims. Were the insurance proceeds to be depelted by the claimant in the state court action against the captain, all other claimants would be confined to the limitation proceeding and a fund not great-

er than the estimated $625,000 value of the Pearl Kai. Additionally, the claimant in state court would have her case tried before a jury under principles of tort law. The limitation proceeding would presumably be tried to the court under rules of admiralty. The differences between the two forums and the amounts of relief available in each might induce some claimants to also seek recovery against the captain in state court. The end result would be to relegate the limitation proceeding to a role of secondary importance rather than the central adjudication it was intended to be. *See Pershing Auto Rentals, Inc. v. Gaffney,* 279 F.2d 546, 549 (5th Cir.1960). Moreover, those claimants who depend on the limitation action for redress of their injuries would be at a disadvantage compared to those who proceeded against the captain under principles of tort law in state court and recovered from the insurance proceeds. Such a result would obviously defeat the equitable marshalling of assets that the Limitation Act contemplates.

Second, allowing claimant to proceed against the captain in state court could subject the limitation action to collateral estoppel effects resulting from the state court adjudication. *Guillot v. Cenac Towing Co.,* 366 F.2d 898, 907 (5th Cir.1966). At this point it is not possible to tell whether principles of collateral estoppel will definitely apply to the limitation proceeding following a state court trial of the captain's liability. However, the role of the admiralty proceedings as the central adjudicator would be diminished if it were bound by findings made in another forum. Even if the limitation proceeding were not so constrained, trying the same issues for a second time would result in the inefficient use of judicial resources which the Limitation Act seeks to prevent.

On balance, the purposes of the Limitation Act require that the claimant's action against the captain in state court be stayed pending the outcome of the limitation proceedings. To adhere to a literal reading of § 187 would, in this case, greatly compromise the purposes of the Limitation Act. Concededly, the stay affects claimant's remedies against the captain but to an extent not inconsistent with the underlying aims of the Limitation Act as a whole. Upon completion of the limitation action, claimant will be free to pursue its rights against the captain and the insurance proceeds, if applicable, in state court.

It is therefore ordered that:

1. Claimant's motion to dismiss for lack of subject matter jurisdiction is denied;

2. The restraining order is extended to stay any actions against the captain in state court pending the completion of the proceedings in admiralty.

UNITED STATES COURT OF APPEALS
FOR THE NINTH COURT

85-1648)
No. 85-1889)

DC CV 84-0783 PAR

IN THE MATTER OF: The Complaint of PARADISE HOLDING, INC., a Hawaii corporation, as owner of, and PARADISE CRUISE, LIMITED, a Hawaii corporation, as lessee and charterer of the P/V PEARL KAI, Official Number 527 873, for exoneration from or limitation of liability.

TERRY LEE K. STONE, Individually; As Special Administratrix of the Estate of PAUL HENRY STONE; etc., et al.,

Claimants-Appellants,

vs.

PARADISE HOLDINGS, INC. and PARADISE CRUISE, LIMITED,

Appellees.

JUDGMENT

(Filed August 25, 1986)

APPEAL from the United States District Court for the ——— District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ——— District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and ajudged by this Court, that the ——— judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY

ATTEST AUGUST 19, 1986
CATHY A. CATTERSON
Clerk of Court

by: Oscar Tagle
Deputy Clerk

Filed and entered July 25, 1986.